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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

WALTER A. LAVENDER, Administrator De Bonis Non of the Estate of L. E. HANEY, Deceased,	Petitioner,	} No. 427.
vs.		
J. M. KURN et al., Trustees of the St. Louis- San Francisco Railway Company, Debtor, and ILLINOIS CENTRAL RAILROAD COMPANY,	Respondents.	

On Writ of Certiorari to the Supreme Court of the
State of Missouri.

REPLY BRIEF OF PETITIONER.

SUMMARY OF ARGUMENT.

I.

The judgment and opinion of the Supreme Court of Missouri of June 10, 1946, on its face is inconsistent with the judgment and opinion of this Honorable Court.

Lavender v. Kurn, ... U. S. ..., 66 Sup. Ct. 740,
90 L. Ed. 692;

Lavender v. Kurn, 195 S. W. (2d) 460;

Bailey v. Central Vermont R. Co., 319 U. S. 350,
87 L. Ed. 1444, 63 S. C. 1062;

Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29, 88 L. Ed. 520, 64 S. C. 409;

Tiller v. Atlantic Coast Line R. Co., 323 U. S. 574, 89 L. Ed. 465, 65 S. C. 315;

Blair v. Baltimore & Ohio R. Co., 323 U. S. 600, 89 L. Ed. 490, 65 S. C. 545;

Seago v. New York Central R. Co., 315 U. S. 781, 86 L. Ed. 1188, 62 Sup. Ct. 806.

II.

Having assumed jurisdiction of this cause at the October Term, 1945, this court has jurisdiction to issue its writ of certiorari to give effect to its judgment, opinion and mandate.

12 Cyclopedia of Federal Procedure, par. 6398.

ARGUMENT.

I.

In their argument counsel for respondents accuse petitioner of attempting "to distort the language which this court used in its opinion," and then proceed to attempt to commit the same error of which they accuse petitioner. They point out that what this court in its opinion of March 25, 1946 "evidently meant" was that the Supreme Court of Missouri should not have reversed the case outright on its first consideration thereof, but that it was not limited in disturbing or reversing the verdict of the jury on any subsequent consideration of the case. This court did not so limit the application of its opinion. The opinion on its face shows that the jury verdict against both respondents should not be reversed or disturbed at any time. This court decided and held in its opinion in this case that the verdict should not be reversed or disturbed, saying:

"We are unable therefore to sanction a reversal of the jury's verdict against Frisco trustee. Nor can we approve any disturbance in the verdict as to Illinois Central."

The Supreme Court of Missouri ruled inconsistent with the above holding and mandate of this court by ordering the verdict and judgment against both of the respondents reversed. It was ordered not to disturb or reverse the verdict; nevertheless, it thereafter ruled inconsistent with that order by reversing the judgment as against each of respondent railroads. If this court had decided as respondents contend that the jury verdict could be disturbed or reversed at a subsequent consideration thereof by the Supreme Court of Missouri, then certainly this court would have so stated in its opinion.

Respondents claim that this court did not pass upon the

admissibility of the evidence and particularly that this court did not pass upon the competency of the *res gestae* statement of witness Drashman. In this contention respondents are in error. The question of the competency of the *res gestae* statement of witness Drashman was made an issue in the briefs by all the parties before this court and this court passed upon that question by saying and holding:

“Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers’ Liability Act. But inasmuch as there is adequate support in the record for the jury’s verdict apart from the hearsay testimony, we need not determine whether that discretion was abused in this instance.”

It will thus be seen that this Honorable Court passed upon, held and ruled that the admission of evidence in a Federal Employers’ Liability Act case **must** normally be left to the sound discretion of the trial judge, not the appellate court. The Missouri Supreme Court ruled inconsistent with this holding and mandate of this court by usurping the power of the trial judge and deciding that the *res gestae* statement was incompetent and constituted reversible error. This court had held that inasmuch as there was sufficient evidence to take the case to the jury apart from the *res gestae* statement that it need not be determined whether the trial court had abused its discretion in admitting such evidence. The Missouri Supreme Court ruled inconsistent with this and followed its opinion of June 4, 1945, in holding that the *res gestae* statement of Drashman was incompetent and ordered the judgment reversed by reason thereof. This first opinion and judgment of the Missouri Supreme Court was reversed by this court’s judgment and opinion. The Missouri Supreme Court should have ruled consistent with the above holding of this court in its second opinion and followed the same as it was its duty to do.

In other recent cases before this Court under the Federal Employers' Liability Act, this court has likewise considered such cases on the merits and held that jury verdicts rendered therein were supported by evidence of negligence of defendants, and inferior appellate courts which had held that the verdicts in such cases were not supported by evidence of negligence, unhesitatingly obeyed the mandates of this court. For instance:

In the case of *Bailey v. Central Vermont R. Co.* (5-24-1943), 319 U. S. 350, 87 L. Ed. 1444, 63 Sup. Ct. 1062, plaintiff obtained a verdict and judgment in the trial court under the Federal Employers' Liability Act, which judgment was reversed by the Supreme Court of Vermont, said court holding that the motion for a directed verdict should have been granted because negligence was not shown. This court, on certiorari, reviewed the issues which it was necessary to decide in order to dispose of the case on the merits, held that there was sufficient competent evidence of negligence to support the verdict of the jury and reversed the cause. The printed reports of cases show that no subsequent decision was rendered in the Supreme Court of Vermont, and presumably that court followed the mandate of this court and merely issued its mandate to the trial court affirming the trial court judgment.

In the case of *Tennant v. Peoria & Pekin Union R. Co.* (1-17-1944), 321 U. S. 29, 88 L. Ed. 520, 64 Sup. Ct. 409, plaintiff recovered a verdict and judgment in a United States District Court under the Federal Employers' Liability Act, which judgment was reversed by the United States Circuit Court of Appeals on the ground that, while there was evidence of negligence by defendant, there was no substantial proof that such negligence was the proximate cause of the employee's death. This court reviewed the issues necessary to be decided in order to dispose of the case on the merits, and held that there was sufficient competent proof to support the charge that the negligence of

defendant was the proximate cause of the employee's death, holding: "We accordingly reverse the judgment of the court below and remand the case to it for further proceedings not inconsistent with this opinion." The same holding was made by this court in the instant case. The printed reports of cases show that no subsequent decision was rendered by the United States Circuit Court of Appeals, leading one to the conclusion that said court must have merely issued its mandate sustaining the judgment of the trial court.

In the case of *Tiller v. Atlantic Coast Line R. Co.* (1-15-45), 323 U. S. 574, 89 L. Ed. 465, 65 Sup. Ct. 315, plaintiff obtained a verdict and judgment in a United States District Court under the Federal Employers' Liability Act, which judgment was reversed by the Circuit Court of Appeals and the cause remanded, because it held there was no evidence that the alleged violation of the Boiler Inspection Act was the proximate cause of the accident in which plaintiff was injured. This court reviewed the entire case, held that there was sufficient competent evidence to support the jury verdict, and held that "The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed." The printed reports of cases show that no subsequent decision was rendered by the Circuit Court of Appeals, showing thereby that the Circuit Court of Appeals merely issued its mandate sustaining the judgment of the trial court.

In the case of *Blair v. Baltimore & Ohio R. Co.* (1-29-45), 323 U. S. 600, 89 L. Ed. 490, 65 Sup. Ct. 545, plaintiff obtained a verdict and judgment in the trial court under the Federal Employers' Liability Act, which judgment the Supreme Court of Pennsylvania reversed on the ground that there was no evidence of negligence to support the verdict. This court, on certiorari, reviewed the evidence, held that there was sufficient evidence to support the jury verdict on the question of negligence, reversed the judg-

ment of the Supreme Court of Pennsylvania and remanded the cause "for proceedings not inconsistent with this opinion." The Supreme Court of Pennsylvania thereafter vacated and rescinded its judgment of reversal and remanded the cause to the trial court for proceedings therein not inconsistent with the opinion of the United States Supreme Court (353 Pa. 105, 44 A. [2d] 279). The trial court thereupon proceeded "to vacate and rescind our order granting a new trial and to order that **judgment be entered on the verdict.**"

In the cases hereinabove mentioned this court reviewed and decided all the issues necessary to be decided in order to dispose of the cases on the merits and held that the jury verdicts were supported by evidence of negligence of the defendants. In the instant case this court went further and specifically pointed out that the jury verdict should not be reversed or even disturbed, and that the Supreme Court of Missouri must "abide by the verdict rendered by the jury." No language is needed to explain the meaning of the opinion of this court.

In the case of *Seago v. New York Central R. Co.*, 315 U. S. 781, 86 L. Ed. 1188, 62 Sup. Ct. 806, this court reversed a judgment of the Missouri Supreme Court in a case under the Federal Employers' Liability Act in which the Missouri Supreme Court on appeal by the plaintiff from an adverse judgment, had held that there was not sufficient evidence of negligence to submit the case to the jury and that, therefore, they would not consider questions of erroneous instructions given on behalf of the defendant railroad. This court in a memorandum opinion reversed the Missouri Supreme Court and held and stated:

"The petition for writ of certiorari is granted and the judgment is reversed on the ground that there was sufficient evidence of negligence for submission to the jury. The case is remanded to the Supreme

Court of Missouri for its consideration of other questions presented on the appeal and for further proceedings not inconsistent with this opinion.”

The Missouri Supreme Court upon receiving said mandate proceeded consistent with the above opinion by reversing its former judgment and considering other questions presented on the appeal and sustaining the appeal of the plaintiff and ordering a new trial. *Seago v. New York Central R. Co.*, 349 Mo. 1249, 164 S. W. 2d 336.

In the case at bar this court did not in its opinion and mandate direct that the Missouri Supreme Court should consider other questions presented on the appeal, because all the questions presented on the appeal had been decided by this Court. This court only directed in the instant case that the cause be remanded for further proceedings not inconsistent with the opinion. In other words, when this court finds that other questions should be decided by lower appellate courts, then, as in the *Seago* case, *supra*, it directs that said courts consider said questions and decide the same. In the instant case the Missouri Supreme Court did not have any questions before it to be decided, because this court had decided all questions in the case necessary to be decided in order to dispose of the case on the merits.

The argument of counsel for respondents that the question of the admissibility of evidence in this case involves a procedural question beyond the power of this court to consider is without merit. The rights claimed by petitioner arise under a Federal Act and such rights are protected by Federal rather than local rules of law. In the cases hereinabove cited, *supra*, and in the prior consideration of the instant case, this court determined that there was sufficient competent evidence to support the jury verdicts. If the Supreme Court of Missouri can rule, as it did in the instant case, that evidence, consisting of the statement of witness Drashman, was inadmissible, after this court had

specifically discussed such evidence in its opinion, and held that such evidence need not be considered since the other evidence in the case adequately supported the jury's verdict, and that the admission of such evidence must be left to the discretion of the trial judge, then the authority of this court to decide the cases hereinabove mentioned and the instant case did not exist, and the theory that the judgments and opinions of this court are final and binding is a delusion.

II.

Respondents cite a number of cases in an attempt to show that the decision of the Supreme Court of Missouri sought herein to be reviewed is not final. This court during the October Term, 1945, assumed jurisdiction in this cause and decided that the jury verdict should not be reversed, nor even disturbed. The instant proceeding does not concern the merits of the controversy between the parties to the cause, but concerns solely the question of whether the Supreme Court of Missouri has obeyed the judgment, opinion and mandate of this Court. Having already assumed jurisdiction, this court has both the inherent and statutory power to give effect to its judgments. The cases cited by respondents under part II of their argument are therefore irrelevant, for in none of said cases did an inferior appellate court refuse to obey the judgment, opinion and mandate of this Court.

In 12 Cyclopedica of Federal Procedure, para. 6398, it is stated that "a second appeal is the appropriate remedy to effectuate a mandate from the Supreme Court to a State Court." Since writs of certiorari have taken the place of writs of error, the instant certiorari proceeding is now the appropriate remedy within the meaning of said authority.

On page 3 of respondents' suggestions, respondents complain that the cases cited by petitioner in his brief do not apply to the issues involved in this case for the reason that

such cases involve land titles. It is true, as respondents contend, that such cases do not involve rights claimed under the Federal Employers' Liability Act, but it is also true that in all the cases heretofore considered by this court involving the Federal Employers' Liability Act, inferior appellate courts, to which this court directed its mandates, obeyed such mandates and thereby made it unnecessary for litigants to appeal to this court to give effect to its judgments and mandates.

The right which petitioner herein seeks to have protected is more than a procedural one; it is the right to a jury trial guaranteed by the Constitution of the United States, and the right to claim the benefit of a jury verdict which this court held should not be reversed or even disturbed.

Respectfully submitted,

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